Without recourse to procedural default, the State has nothing to say. In particular, it does not contest that:

- Mary White, a probation officer, interrogated Herring in custody without administering *Miranda* warnings.
- The State does not know when this interview took place; it could have occurred as long as seventeen days after Herring's arrest, the only time he received *Miranda* warnings.
- The admission of this testimony at the penalty phase trial was in clear violation of *Estelle v. Smith*, 451 U.S. 454 (1981).
- The prosecutor violated Herring's Fifth, Sixth, and Fourteenth Amendment rights as well as Rule 3.220 of the Florida Rules of Criminal Procedure by not giving the defense notice of the substance of White's testimony, particularly its racially inflammatory character.

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appellate counsel may satisfy the cause requirement of this Court's procedural default doctrine. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986). Had Herring's appellate counsel raised the Miranda claim on direct appeal, the Florida Supreme Court would have been required to vacate Herring's death sentence under *Estelle* and *Miranda*. Had counsel raised the State's clear violation of Florida's notice requirement, the surprise use of White's testimony would also have led to reversal.

## CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that the Court (a) grant certiorari review; (b) summarily reverse pursuant to *Clemons* and *Sochor*; or (c) vacate and remand in light of *Miller-El* and *Rompilla*.

Respectfully submitted,

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August 11, 2005

# SUPPLEMENTAL APPENDIX

# EXCERPT OF STATE RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS, FILED FEBRUARY 4, 2000

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## 1. THE "INVALID AGGRAVATING CIRCUMSTANCE" CLAIM

In claim 1 of the petition (pages 22-30 of the addendum), Herring argues that he is entitled to relief because the Florida Supreme Court "struck" the cold, calculated, and premeditated aggravating circumstance in his case, and did not subsequently conduct the "analysis mandated by *Clemons v. Mississippi*" in upholding his sentence of death. Herring raised this claim in his 1988 *Florida Rule of Criminal Procedure* 3.850 motion. The collateral proceeding trial court denied relief, and the Florida Supreme Court affirmed the denial of relief on this claim. Specifically, the Florida Supreme Court held:

> With regard to Herring's first claim, we find that our *Rogers* decision does not mandate relief under the circumstances of this case. There were four aggravating factors found applicable to this murder: (1) prior conviction of another armed robbery; (2) that the murder was committed while engaged in the commission of a robbery; (3) that the murder was committed for the purpose of avoiding lawful arrest; and (4) the aggravating circumstance in issue, that this murder was committed in a cold, calculated, and premeditated manner. As noted by this Court in *Eutzy v. State*, 541 So.2d 1143, 1147 (Fla. 1989),

our decision in *Rogers*, restricting the applicability of the cold, calculated, and premeditated aggravating factor, was not a fundamental change in the law that should be given retroactive effect but was "a mere evolutionary refinement in the law," which should not be utilized to abridge the finality of our judgments. Although we have held in *Eutzy* that *Rogers* is not retroactive, we have chosen to address this issue on the merits because we expressly receded from our approval of the cold, calculated, and premeditated aggravating factor in *Herring I* in our *Rogers* decision.

While the cold, calculated, and premeditated aggravating factor no longer applies to the circumstances in *Herring*, we find that this is not a change that requires a new sentencing hearing in this case. None of the facts and circumstances that were before the jury regarding how Herring committed the murder are changed. If the aggravating circumstance of a "conviction of a prior crime of violence" had been eliminated, that would have changed the facts and circumstances before the jury.

The evidence before the jury established that Herring shot the clerk once in the head and again after the clerk fell to the floor and that the second shot was to prevent the clerk from being a witness against him. *Herring I* at 1057. **Given the other aggravating and mitigating factors that went into the weighing process in the sentencing phase of this case, we find that the result of the weighing process would not have been dif-**

> **ferent had this aggravating circumstance not been articulated as a factor in the sentencing. We find that the elimination of this factor, under the circumstances of this case, does not compromise the weighing process of either the judge or jury.** *See Hill v. State*, 515 So.2d 176 (Fla. 1987), *cert. denied*, 485 U.S. 993, 108 S.Ct. 1302, 99 L.Ed.2d 512 (1988).

*Herring v. State*, 580 So.2d at 138. [emphasis added].

Because the Florida Supreme Court decided this claim on the merits[3], the writ of habeas corpus cannot be granted unless that merits determination is contrary to, or an unreasonable application of, precedent announced by the United States Supreme Court, or is an unreasonable determination of the facts in light of the evidence from the state court proceeding. 28 U.S.C. §2254(d). Under the posture of this claim, the "contrary to/unreasonable application of precedent" standard is the one that applies—when that evaluation is conducted, there is no basis for federal relief.

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[3] The Florida Supreme Court could have decided this claim on procedural bar grounds, but elected to reach the merits of this claim because of the highly unusual posture of this case. *Herring v. State*, 580 So.2d at 137-8.